BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SANDRA WILLIAMS-HALL	)	
Claimant	)	
VS.	)	
	)	Docket No. 241,150
SUNFLOWER ELECTRIC POWER	)	
Respondent	)	
AND	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the October 3, 2000 Decision entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on March 9, 2001, in Wichita, Kansas.

APPEARANCES

Russell B. Cranmer of Wichita, Kansas, appeared for claimant. Richard J. Liby of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Decision.

ISSUES

This is a claim for a series of mini-traumas and overuse injuries that resulted in bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome. Claimant's Application for Hearing designated the date of accident as "4-7-97 and each and every workday thereafter."

In the October 3, 2000 Decision, the Judge determined that claimant's accidental injury continued through the last day that claimant worked for respondent, which was approximately March 30, 1999. The Judge also awarded claimant a 44 percent permanent

partial general disability through March 2000 followed by a 47½ percent permanent partial general disability.[1]

Respondent and its insurance carrier contend Judge Fuller erred. They argue that the date of accident should either be the date that claimant sought medical treatment for these injuries on approximately October 14, 1997, or the date in June 1998 following claimant's surgeries that she was released to return to work without restrictions. They also contend that claimant has no task loss as claimant returned to her regular work in June 1998 without any work restrictions and with only minor accommodations.

Conversely, claimant contends the permanent partial general disability rating should be increased because the task loss is at least 60 percent instead of the 29 percent determined by the Judge. The Judge calculated the 29 percent task loss after finding that claimant had proven that she was unable to do seven of 25 former tasks.

The only issues before the Board on this appeal are:

1. What is the appropriate date of accident for claimant's work-related injuries?

2. What is the nature and extent of injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant, who has a tenth grade education, worked for respondent for approximately 17 years, until leaving respondent's employment at the end of March 1999. During the last years of claimant's employment, claimant's job required intensive hand and wrist movement as a significant portion of claimant's job required the use of a computer keyboard and data entry.

2. Over the course of her employment with respondent, claimant developed bilateral hand numbness and pain. In 1996, claimant consulted a doctor and was advised to wear wrist splints as much as she could. While continuing to work for respondent, the pain and numbness progressively worsened.

3. In 1997, claimant saw a Dr. Wilson for her upper extremity complaints. Dr. Wilson referred claimant to Dr. Michael J. Baughman, who is an orthopedic surgeon in the same clinic. Dr. Baughman first saw claimant in October 1997 and diagnosed left carpal tunnel

[1] The disability rating increased when the employer-paid insurance benefits ceased, causing an increase in the average weekly wage and an increase in the wage loss percentage that is used in the permanent partial general disability formula.

syndrome and left cubital tunnel syndrome. In late November 1997, Dr. Baughman operated on claimant's left wrist and elbow and released claimant to restricted duty work. On March 25, 1998, the doctor released claimant to return to work without restrictions.

4. When Dr. Baughman released claimant to return to work without restrictions, claimant returned to Dr. Wilson with right upper extremity symptoms. Dr. Wilson again referred claimant to Dr. Baughman, who then in April 1998 operated on claimant's right wrist and elbow for carpal tunnel syndrome and cubital tunnel syndrome. After that surgery, Dr. Baughman initially released claimant to work on light duty and in June 1998 released claimant to work with no restrictions.

5. From June 1998 through the end of March 1999, claimant worked for respondent performing computer keyboarding. That work caused claimant's hands and wrists to swell and hurt. On several occasions, claimant advised her supervisor that her job duties were causing symptoms. The supervisor advised claimant to take breaks and to slow down as much as she could. But claimant was still expected to complete her work assignments. Respondent also attempted to further accommodate claimant by providing her two different computer keyboards and a different chair.

6. Claimant returned to Dr. Baughman in February 1999 because of the recurrence and worsening of upper extremity symptoms. The doctor wanted to do additional tests but the insurance carrier denied the request.

7. In March 1999, claimant was evaluated by Dr. Pedro A. Murati, who recommended that claimant limit her keyboarding to no more than 20 minutes without a break. Following that medical evaluation, claimant's supervisors spoke with claimant about her job. Claimant testified, in part:

> . . . He [claimant's supervisor] says, I don't know how you can go on with your swollen hands, you can't he [sic] even bend them to key in words into the computer, input; and I did ask -- at the -- Ran -- not Randy, it was Bob, Bill and Cathy talked to me about do I actually think I can continue the way I am, continuing inputting and so forth with the severity of my injuries. Of course, I wanted to try, but they just didn't think I could do it.[2]

Based upon claimant's injuries and ongoing symptoms, claimant and respondent concluded that claimant could not continue to perform her job duties. In April 1999, claimant met with her supervisor about different job duties. But claimant was advised that the company was so computer-oriented that there were no appropriate jobs available.

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[2] Transcript of Proceedings, January 24, 2000; p. 27.

8. After leaving respondent's employment, claimant filed for unemployment benefits and sought work in the Garden City, Kansas, area until she and her husband moved to Hoyt, Kansas, where she began a job search. In November 1999, respondent and its insurance carrier provided claimant with job placement services. Claimant eventually obtained a job as a security guard earning $280 per week. The Judge found that claimant began her new job on April 17, 2000, and the parties do not dispute that finding.

9. Dr. Baughman testified that claimant had a one percent whole body functional impairment as a result of her bilateral upper extremity injuries. The doctor testified that he used his experience and training, along with consulting the AMA *Guides to the Evaluation of Permanent Impairment* (*Guides*) in formulating claimant's functional impairment rating. But on cross-examination the doctor indicated that he did not use any specific section of the *Guides* for the impairment rating. The doctor also testified that claimant would have no impairment had he used the *Guides*. But the doctor admits that the *Guides* do contain provisions for rating demonstrable impairment of nerves and that claimant had residual complaints of pain after surgery that waxed and waned. Finally, the doctor testified that claimant is not restricted from doing anything; therefore, claimant has not lost the ability to do any of her former work tasks.

10. The Judge ordered an independent medical evaluation by Dr. Terrance C. Tisdale, who examined claimant in August 1999. Using the fourth edition of the AMA *Guides*, the doctor determined that claimant had a 20 percent functional impairment in the right upper extremity and a 20 percent functional impairment in the left upper extremity, which convert to a 23 percent whole body functional impairment. The doctor also believes that claimant should be restricted from activities that involve forceful or repetitive use of her hands or forearms. Should claimant continue to do computer work, the doctor suggested that she try altering the height of the computer or her position in relationship to the keyboard and limit her time on the keyboard to 30 to 40 minutes followed by a 10-to-15-minute break from that activity.

11. Vocational rehabilitation consultant Karen Crist Terrill interviewed claimant and compiled a list of the work tasks that claimant performed in the 15-year period before she sustained her work-related bilateral upper extremity injuries. Dr. Tisdale reviewed the task list prepared by Ms. Terrill and identified the following six former work tasks as those that claimant should no longer perform:

> "Updated manual"; "Hands on maintenance"; "Assisted with calibrating instruments"; "Minor maintenance"; "Moved furniture"; and "Picked up parts."

The doctor identified the following 17 former work tasks as those that claimant should be able to perform:

> "Filed"; "Planned work orders"; "Ordered parts"; "Developed maintenance schedule"; "Scheduled preventive maintenance"; "Obtained information from data plates"; "Put on tool pouch and safety equipment"; "Completed/updated calibration forms"; "Loaded cart with supplies"; "Swept/mopped"; "Vacuumed"; "Emptied trash"; "Dusted"; "Cleaned restrooms"; "Washed windows"; "Drove vehicle to run errands"; and "Did paperwork."

Finally, the doctor identified the following five former tasks as those that claimant could possibly do if she took frequent breaks from the repetitive activity:

> "Input data into computer"; "Prepared work orders"; "Scheduled maintenance on work orders"; "Researched parts"; and "Carried tools/manuals."[3]

Therefore, the doctor has categorized 28 work tasks into three categories: six tasks that claimant has lost the ability to perform due to the bilateral upper extremity injuries, 17 tasks that claimant retains the ability to perform, and five tasks that claimant may or may not be able to do depending upon the manner in which they are performed.

Claimant argues that she has a 60 to 100 percent task loss based upon Dr. Tisdale's testimony that claimant could perform several of her former work tasks if she were permitted to take frequent breaks from the repetitive activity. Although claimant argues that she was not given frequent breaks while performing those former work tasks, that evidence is not contained in the record.

The greater weight of the evidence establishes that claimant is unable to input data into a computer. Therefore, that task should be counted as an additional task that claimant has lost the ability to perform as the result of her work-related upper extremity injuries. Considering the entire record, the Board finds that claimant has proven that she is unable to perform seven of 28 former work tasks. The Board concludes that claimant has proven a 25 percent task loss.

12. Claimant's attorney hired Dr. Pedro A. Murati to examine and evaluate claimant. The doctor examined claimant on March 25, 1999, and determined that claimant should only work eight hours per day and be restricted from climbing ladders, crawling, repetitive grasping and grabbing, and heavy grasping. The doctor also believes that claimant should limit any keyboarding to 20 minutes at a time followed by a 40-minute break from that activity. The doctor would further restrict claimant from more than occasional repetitive hand controls. Also, the doctor would restrict claimant's lifting, carrying, pushing, or pulling

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[3] Dr. Tisdale indicated that claimant could perform the "carried tools/manuals" task if it only took a few minutes but that claimant could not perform that task if it required constant activity.

to no more than 10 pounds occasionally, no more than five pounds frequently, and nothing constantly. Using the AMA *Guides*, the doctor rated claimant as having a 21 percent whole body functional impairment.

13. Considering the testimonies from the three doctors, the Board is persuaded by Dr. Tisdale's testimony that claimant has sustained a 23 percent whole body functional impairment.

14. Claimant's last day of work for respondent was approximately March 30, 1999. Respondent retained claimant on its health insurance through approximately March 2000. For purposes of this claim, the parties agree that claimant's average weekly wage was $689.20 for the period before April 1, 2000, and $812.64 for the period commencing with that date.

CONCLUSIONS OF LAW

1. The Decision should be modified to increase the permanent partial general disability to 63 percent until April 17, 2000, and to decrease the permanent partial general disability to 46 percent for the period commencing with that date.

2. The Board concludes that the appropriate date of accident for the series of mini-traumas and the repetitive use injuries involved in this claim is claimant's last date of work on approximately March 30, 1999. The Board concludes that claimant performed hand-intensive work through that date and, therefore, continued to experience mini-traumas and repetitive use injuries until she left respondent's employment.

Following creation of the bright line rule in the 1994 *Berry*[4] decision, the appellate courts have grappled with determining the date of accident for repetitive use injuries. In *Treaster*,[5] which is one of the most recent decisions on point, the Kansas Supreme Court held that the appropriate date of accident for injuries caused by repetitive use or mini-traumas is the last date that a worker (1) performs services or work for an employer or (2) is unable to continue a particular job and moves to an accommodated position. *Treaster* can also be construed as focusing upon the offending work activity that caused the worker's injury as it holds that the appropriate date of accident for a repetitive use injury can be the last date that the worker performed his or her work duties before being moved to a substantially different accommodated position.

> Because of the complexities of determining the date of injury in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case that is the direct

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[4] *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

[5] *Treaster v. Dillon Companies, Inc.*, 267 Kan. 610, 987 P.2d 325 (1999).

> result of claimant's continued pain and suffering, the process is simplified and made more certain if the date from which compensation flows is the last date that a claimant performs services or work for his or her employer or is unable to continue a particular job and moves to an accommodated position.[6]
>
> Where an accommodated position is offered and accepted that is not substantially the same as the previous position the claimant occupied, the date of accident or occurrence in a repetitive use injury, a carpal tunnel syndrome, or a micro-trauma case is the last day the claimant performed the earlier work tasks.[7]

In *Treaster*, the Kansas Supreme Court also approved the principles set forth in *Berry*, in which the Court of Appeals held that the date of accident for a repetitive trauma injury is the last day worked when the worker leaves work because of the injury.

3. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as

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[6] *Treaster*, syl. 3.

[7] *Treaster*, syl. 4.

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injuries.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

4. The Board concludes that claimant made a good faith effort to both retain her employment with respondent and to look for employment once she left that job. The greater weight of the evidence indicates that claimant remained with respondent as long as she could and finally left respondent's employment as she was unable to keep up with her work because her hands were swelling and hurting. Claimant even asked for different job duties but was told that the company had no other work for her. After leaving respondent's employment, claimant then contacted two or three potential employers per week until she obtained the security guard job. Because claimant exercised good faith in attempting to find appropriate employment, her actual post-injury wages should be used in the permanent partial general disability formula.

5. For the period to April 17, 2000, claimant was unemployed and, therefore, had a 100 percent wage loss. Averaging that wage loss with the 25 percent task loss creates a 63 percent permanent partial general disability.

For the period commencing April 17, 2000, claimant began earning $280 per week and, therefore, has proven a 66 percent wage loss. Averaging that wage loss with the 25 percent task loss produces a 46 percent permanent partial general disability.

6. The Board adopts the findings and conclusions set forth in the Decision that are not inconsistent with the above.

AWARD

WHEREFORE, the Board modifies the October 3, 2000 Decision to increase the permanent partial general disability to 63 percent until April 17, 2000, and to decrease the permanent partial general disability to 46 percent for the period commencing with that date.

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[10] *Copeland*, p. 320.

Sandra Williams-Hall is granted compensation from Sunflower Electric Power and its insurance carrier for a March 30, 1999 accident and resulting disability. Ms. Williams-Hall is entitled to receive 13.43 weeks of temporary total disability benefits at $366 per week, or $4,915.38. Thereafter, 41.29 weeks of benefits are due at $366 per week, or $15,112.14, for a 63 percent permanent partial general disability for the period from July 3, 1999, through April 16, 2000. Thereafter, 149.61 weeks of benefits are due at $366 per week, or $54,757.26, for a 46 percent permanent partial general disability for the period commencing April 17, 2000. The total award is $74,784.78.

As of June 25, 2001, there is due and owing to the claimant 13.43 weeks of temporary total disability compensation at $366 per week in the sum of $4,915.38, plus 103.43 weeks of permanent partial general disability compensation at $366 per week in the sum of $37,855.38, for a total due and owing of $42,770.76, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $32,014.02 shall be paid at $366 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Decision that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Russell B. Cranmer, Wichita, KS
Richard J. Liby, Wichita, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director